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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 583

JOHN COLEMAN,

Petitioner

Vs.

STATE OF ALABAMA,

Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT

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STATUTORY PROVISIONS

Title 15, Sections 278 and 279, Code of Alabama, as Recompiled 1958 3

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QUESTION PRESENTED

WHETHER, WHERE THERE IS NO EVIDENCE AS TO REASONS FOR NOT RAISING CONSTITUTIONAL QUESTIONS RELATIVE TO COMPOSITION OF THE GRAND JURY PRIOR TO ARRAIGNMENT OR OF THE PETIT JURY PRIOR TO ENTERING UPON THE TRIAL OF A CASE ON ITS MERITS, SUCH QUESTIONS MAY BE RAISED FOR THE FIRST TIME AFTER A VERDICT AND JUDGMENT OF GUILTY.

ARGUMENT

WHERE THERE IS NO EVIDENCE AS TO REASONS FOR NOT RAISING CONSTITUTIONAL QUESTIONS RELATIVE TO COMPOSITION OF THE GRAND JURY PRIOR TO ARRAIGNMENT OR OF THE PETIT JURY

PRIOR TO ENTERING UPON THE TRIAL OF A CASE ON ITS MERITS, SUCH QUESTIONS MAY NOT BE RAISED FOR THE FIRST TIME AFTER A VERDICT AND JUDGMENT OF GUILTY.

In his brief, the Petitioner recognizes the reasonableness of the procedural requirements that any objection to the formation of the grand jury must be made prior to entering a plea to the indictment and that any objections to the petit jury venire must be made before trial. Yet he takes the inconsistent position that he can go to trial without raising any objections as to the compositttion of such juries and later if he is dissatisfied with the verdict and judgment, he can raise such questions for the first time in a Motion for New Trial.

As was said by the Supreme Court of Alabama in *Vernon v. State*, 240 Ala. 577, 200 So. 560:

> ". . . no skilled lawyer would ever attempt to raise such question until after conviction. Why not take a chance on gaining an acquittal before raising the constitutional issue? To now hold that the question may be raised after the trial is over would be to make a mockery of all criminal prosecutions."

Neither in his Motion for New Trial, in his offer of proof relative thereto, nor in his brief does Petitioner make any claim that his Court-appointed white attorney negligently failed to raise the constitutional questions as in *United States ex rel Willie Seals, Jr. v. Wiman*, 5 Cir., 304 F.2d 53, cert. den. 372 U.S. 915, 83 S.Ct. 717, 9 L.ed.2d 722, or that his trial attorney had not effectively waived the question as in *United States ex rel Goldsby v. Harpole*, 263 F.2d 71.

As was said by this Court in *Francis v. Southern Pacific Co.*, 333 U.S. 445, 450, 92 L.ed. 798, 804, 68 S.Ct. 611, "it

[the Motion for New Trial] is an effort to retrieve a position that was forsaken when it was decided to take a gamble on the existing jury panel. In either case the objection comes too late." See *Baker v. State*, 150 Fla. 446, 7 So.2d 792; *Washington v. State*, 95 Fla. 289, 116 So. 470, cert. den. 278 U.S. 599, 73 L.ed. 528, 49 S.Ct. 8; *Clark v. State*, 239 Ala. 380, 195 So. 260; *Ball v. State*, 232 Ala. 686, 42 So.2d 626, cert. den. 339 U.S. 929, 70 S.Ct. 625, 94 L.ed 1350; *Arrington v. State*, 253 Ala. 178, 43 So.2d 644, cert. den. 339 U.S. 950, 70 S. Ct. 798, 94 L.ed. 1363, *Maund v. State*, 254 Ala. 452, 48 So.2d 553; *Johnson v. Williams*, 244 Ala. 391, 13 So.2d 683; Title 15, Sections 278 and 279, Code of Alabama, as Recompiled 1958.

If the contention made by Petitioner is upheld, it can only result in no end of confusion and chaos in the field of criminal law.

CONCLUSION

Wherefore, for the foregoing reasons, Respondent respectfully prays that the judgment of the Court below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie Hall, one of the Attorneys for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of February, 1964, I served the requisite number of copies of the foregoing Brief for Respondent upon Jack Greenberg and Michael Meltsner, 10 Columbus Circle, New York 19, New York, and upon Orzell Billingsley, Jr., 1630 Fourth Avenue, North, Suite 510-512, Birmingham, Alabama, Attorneys for Petitioner, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to them at their respective addresses.

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